Nos. 82-206, 82-229

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IN THE

Supreme Court of the United States

October Term, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

v.

CARL V. STOTTS, *et al.*,
Respondents.

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners,

v.

CARL V. STOTTS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May a court modify a seniority agreement on layoffs in order to preserve progress under a court ordered affirmative action program when unforeseen circumstances develop and literal application of the seniority provision would undo that progress?

2. Should the courts below have ordered the parties first to explore all alternatives to lay-off including those which would have added financial burdens to the municipality before resolving the conflict between the seniority provision and the affirmative action order?

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¶ 443.59 F.E.P. 34

Other Authorities

Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532 (1962) 25

Blumrosen & Blumrosen, The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times, 28 Rutgers L. Rev. 1082 (1975) 30

Comment, Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy, 59 Geo. L. J. 393 (1970). 45, 46

Elkiss, Modifying Seniority Systems Which Perpetuate Past Discrimination, 31 Labor L. Jnl. 37 (1980) 31

Fix, Plant Seniority & Minority Employees: Title VII's Effect on Layoffs, 47 Col. L. Rev. 73 (1976) 31

N. Y. Times, 5/18/75 § 4 at 8 col.2. 34

Silbergold, Title VII & The Collective Bargaining Agreement: Seniority Under Fire, 49 Temple L. Q. 288 (1976) 31

Stacy, Title VII Seniority Remedies In a Time of Economic Downturn, 28 Vanderbilt L. Rev. 4876 (1975) 31

Summers and Love, Work Sharing As An Alternative to Layoffs by Seniority: Title VII Remedies in Recession, 124 U. Penn. L. Rev. 893 (1976) 30, 31, 35

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INTEREST OF THE AMICUS

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

STATEMENT OF THE CASE

In 1977, Carl Stotts, a black Memphis fireman, filed suit in the United States District Court for the Western District of Tennessee against the City of Memphis and the Memphis Fire Department. The suit, a class action, charged that the defendants had engaged in racially discriminatory hiring and promotional practices in violation of Title VII and 42 U.S.C. §§1981 and 1983.

In 1979, Fred Jones, another black Memphis fireman, filed a separate action alleging that he had been denied a promotion by the Department because of his race in violation of Title VII and 42 U.S.C. §1983. The district court consolidated the two actions and, in April 1980, a settlement agreement

was reached and was presented to the district court for its consideration. The agreement, which provided for promotions and back pay for certain individuals, also committed the City, which did not admit to having violated the law, to a long-term goal of increasing minority representation in each level of the Department to levels approximating the level of minority representation in the local labor force.[1] The agreement also established specific hiring and promotional goals. The hiring goal provided that qualified minorities should fill at least 50% of all vacancies; the promotional goal

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[1] The City had committed itself to this same goal in a consent decree entered into in 1974 with the United States in litigation involving allegations of Title VII violations in a number of city agencies, including the Fire Department.

stated that qualified minorities should fill 20% of the vacancies. The settlement agreement was silent with respect to layoffs, but did require that the trial court retain jurisdiction to make "such further order as may be necessary or appropriate to effectuate the purpose of this decree."

Notice of the proposed settlement was given by posting the decree in Memphis' fire station. Neither the Firefighters Union nor any class member filed any objections. A group of 11 non-minority firemen did object to the entry of the decree and moved to intervene. They claimed the decree constituted reverse discrimination and that there were alternative forms of relief, particularly with respect to

promotions, which were less burdensome for non-minority employees. Among the specific alternatives proposed were the creation of additional positions for promotion, organizational restructuring of the Department, constructive promotion, and the payment of monetary damages to non-minority employees affected by the decree. At a hearing held on the motion to intervene, the intervenors sought a delay in the approval of the promotional section of the decree in order to permit them to develop concrete alternative remedies.

The court denied the motion to intervene and approved the proposed decree. Based on evidence in the record, the court took judicial notice that the City's past employment practices were discriminatory and

determined that the proposed settlement, the "1980 decree" was reasonable.

One year later, the City announced that a deficit in the City's projected operating budget would necessitate personnel reductions in non-essential services. The proposed layoffs, the first in the City's history, would be based on an individual's city-wide union seniority in accordance with a memorandum of understanding between the City and the Union, with the Mayor retaining ultimate authority to determine which job classifications would be subject to layoffs. On the day the City made its public announcement, the plaintiffs obtained a TRO restraining the City from laying

off or reducing in rank any minority employee in the Memphis Fire Department.

At an evidentiary hearing held on plaintiff's application for a preliminary injunction, the court ruled (1) that the announced layoffs and demotions were an unanticipated changed circumstance not provided for in the 1980 decree; (2) that that decree was designed to correct the effects of the City's hiring and promotional practices, and (3) that the proposed layoffs would have a devastating effect on minority employment and on the progress made under the consent decrees. The court also ruled that the layoff policy would have a discriminatory impact and that the seniority system was not bona fide.

The court directed that the City not apply the citywide seniority policy insofar as it would decrease the percentage of minority employees then employed, in certain job categories (A-76). The Court added:

> Now, that may require two seniority lists, but frankly, I don't think that is so bad when you realize that the present situation resulted from prior discrimination, which is obvious.
>
> Now, I am sure that this is going to create problems, and I'm sorry for that. But at the same time, the Court believes that the City should file a proposed plan for not violating the Court's injunction.
>
> Now, I still maintain that I do not have authority to order that no members of the Union be laid off....
>
> In summary, I want the attorneys for the Plaintiff to prepare, within the next week, proposed findings... and then a proposed form of injunction which the Court will consider and sign....

> Now, the injunction should direct the City to propose another layoff policy or an amendment to their current policy. (A-76)

The City thereafter proposed a modified seniority plan under which reductions in force would still be based on seniority, but junior black employees in seven job classifications were protected so as not to reduce the percentage of minority employees in those classifications. The court entered an order approving the City's proposal.

The City and the Union appealed. The Court of Appeals for the Sixth Circuit affirmed. It ruled that the 1980 decree was the result of good faith, arms-length negotiations, and

that the trial court's determination that the decree was fair and reasonable was appropriate.

The court further held that the proposed intervenors' attack on the decree was impermissible and that the costliness of alternatives proposed by them would be inimical to the policy of encouraging settlement of Title VII actions.

With respect to the modification of the consent decree, the court held that that was appropriate on basic contract principles permitting specific enforcement to achieve the goals of the decree and on the ground of changed, unanticipated circumstances. Finally, the Court of Appeals ruled that, while the district court had erred in ruling that the seniority system was not bona

fide, the court had not abused its decision in modifying the decree even though the modification would conflict with the provisions of a collective bargaining agreement.[2]

The fiscal difficulties of the City having been resolved, all employees adversely affected by the 1981 layoffs have now been recalled to work and reinstated to their former positions.

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[2] Three rationales were offered for this ruling: (1) the "settlement" theory; (2) the theory of EEOC v. American Telephone and Telegraphic Co., 419 F.Supp. 1022 (E.D.Pa. 1976), -aff'd, 556 F.2d 167 (3d Cir. 1977); and (3) the theory of Sisco v. J.S. Alberici Construction Co., Inc., 655 F.2d 146 (8th Cir. 1981).

SUMMARY OF ARGUMENT

This case presents the painfully difficult question of who should bear the cost of layoffs resulting from a city's unanticipated budget crunch.[3] On the one hand, laying off minority workers hired in increased numbers under a court-ordered affirmative action program is inconsistent with our nation's commitment of the highest order to eradicate all vestiges of discrimination. On the other hand, laying off employees out of sequence required by bona fide seniority provisions embodied in a collective bargaining agreement and protected against challenge by Title VII is inconsistent with senior employees'

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[3] Amicus believes that the case is now moot and adopts the Respondent's substantive arguments regarding mootness.

contract rights, the preservation of which also reflects a strong public commitment.

Upon the assumption that it was required to resolve the stark conflict between these competing values, the court ruled that it was empowered to modify the consent decree, override the seniority agreement, and approve a species of dual seniority.

Given the court's basic assumption, its decision can be justified as a matter of law, as we argue below. But we believe the resolution of the conflict in such stark terms was an inappropriate way to approach the issue. Rather, alternatives to avoid the conflict between seniority rights and preservation of the court's decree should have been fully explored.

Indeed, the district court did request that the City devise a method to preserve the progress made under the 1980 decree in light of the City's fiscal problems, but the court never really followed through on this request.

We submit that the courts below should have imposed upon the parties the obligation of devising and exploring such alternatives, and, if no satisfactory proposal was advanced by the parties, the court should have determined on its own whether less painful and more equitable alternatives were available.

Work sharing plans, reduced work weeks, elimination of overtime, payless holidays, rotational layoffs, attrition plans or other possibilities short of

layoffs or demotions were never explored or evaluated by the parties or by the court.

We submit further that the fiscal difficulties faced by the City of Memphis were not an unalterable given. The courts below never had determined whether the City's claimed financial problems were real ones. Moreover, even if the City's fiscal shortfall was genuine, the courts had the legal power to, and should have, compelled the raising and expenditure of monies, if necessary, to protect the constitutional and other rights of the minority employees embodied in the affirmative action order, and to carry out the City's obligations under the

seniority provisions of its collective bargaining agreement with its employees.

ARGUMENT

Introduction

The American Jewish Congress believes that the orders appealed from were well within the equitable discretion of the court, and are barred by neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, nor the Constitution. The orders below were within the district court's discretion for the ultimate and "highest priority" is the eradication of discrimination and "the discriminatory effects of the past." Franks v. Bowman, 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

However, the district court should have required the parties to explore, or should itself have explored, means

of avoiding the head-on clash between seniority protections and the minority rights guaranteed by Title VII. Such means were in fact available, since the laid-off workers have now actually been reinstated.

This Court should now settle the law by requiring the federal courts in matters of this kind to explore and, if necessary, to direct alternative approaches. Such approaches can include, in our view, retrenchment, reallocating available resources, worksharing and the like, or even superseding local or state laws regarding municipal expenditures where necessary to preserve constitutionally protected anti-discrimination rights and valuable seniority rights.

POINT I

THE MODIFICATION WAS WITHIN THE EQUITABLE DISCRETION OF THE COURT.

A. Equitable Principles Permit Overriding Literal Application Of The Seniority Provisions.

The district court in this case confronted one of the most troubling dilemmas facing our society today: how to distribute the pains of recession and fiscal austerity so as to prevent reversal of the modest gains made in the struggle against discrimination while not unfairly burdening innocent members of non-minority groups.

Recession hurts many people, but minorities suffer the most. Because our nation has only recently undertaken to redress centuries of segregation and discrimination, minorities have the shortest length of service and when fiscal restraints force cutbacks, they

are the first to be laid off. "Layoffs by seniority 'lock in' the effects of past discrimination by continuing the advantage white males gained in employment by not having to compete with women and minorities." United States Commission on Civil Rights, Last Hired, First Fired: Layoffs and Civil Rights 36 (1977).[4]

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[4] The Commission found that fiscal cutbacks caused by the 1974-75 recession had a devastating effect on minorities in local government:

> The recent recession has had a critical impact on minorities and women. Many had only recently obtained their first promising jobs. Increasing numbers had begun to penetrate employment areas of great importance in our society, such as State and local government. Because they have not had time to acquire adequate seniority, however, minority members and women have been affected disproportionately by the personnel cutbacks occasioned by this recession, and much of their limited progress has thereby been obliterated. In

If unemployment remains high, and the "last hired, first fired approach continues to be widely followed, the modest progress achieved under Title VII and the Constitution in eliminating employment discrimination and its effects will be undone. See id. at 60-61.

> light of dismal predictions of slow economic recovery and continuing high unemployment, this recession threatens to lock these groups into place as a permanent, expendable economic and social underclass.
>
> * * *
>
> In New York City, layoffs in mid-1975 of 371 female officers appointed since January 1973 by the New York City Police Department ended their brief tenure with the previously overwhelmingly male police force. Over half of all Hispanic city workers in New York lost their jobs between July 1974 and November 1975.

Last Hired, First Fired, supra, at 60-61, 25-26.

There may be no painless options, however, and in the end someone may have to pay a price. Even if conventional seniority governs and older white workers keep their jobs, the more recently hired blacks will lose theirs. There is no objective calculus by which to calibrate which group would suffer more from such layoffs, and no criteria by which to judge whose suffering is more unfair or painful.

Certain basic governing principles are, however, clear.

(1) The eradication of discrimination and "the discriminatory effects of the past," Albermarle Paper v. Moody, supra, 422 U.S. at 418 (1975), is the "primary objective" of Title VII, Franks v. Bowman, supra 424

U.S. at 768 n.28, and represents a national commitment of the "highest priority." Id. at 773.

(2) District courts are empowered under §706(g) with "wide discretion ... to fashion the most complete relief possible," Franks v. Bowman, supra, 424 U.S. at 785; Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 361, 365 n.51 (1977), in order to "allow the most complete achievement" of that "highest priority." Franks v. Bowman, supra, 424 U.S. at 770-71. This discretion includes the authority to modify a still-operative decree when circumstances change, in order to preserve and promote its purposes. United States v. United Shoe Corp., 391 U.S. 244 (1968); United States v. Swift, 286 U.S. 106, 119 (1932); cf.

Wright v. City of Emporia, 407 U.S. 451 (1972). If the original decree was legitimate, then a modification to prevent its undoing is equally legitimate.

(3) Seniority is a very important value. It is not a vested right, however, only an expectation, Franks v. Bowman, supra, 424 U.S. at 778-79; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and it is frequently overriden or modified to protect other interests, including the eradication of the effects of discrimination.

The first two points are well-established and need little discussion. The third, however, warrants some elaboration.

"This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." Franks v. Bowman, supra 424 U.S. at 778. Overcoming the effects of racial discrimination has also justified an override of seniority expectations, Id. at 779, either through "constructive seniority as in Franks, or by agreement. United Steelworkers v. Weber, 443 U.S. 193, 198-99 (1979); Savannah Printing Specialities v. Union Camp Corp., 350 F.Supp. 632 (S.D.Ga. 1972). Seniority may also be overridden by special preferences for union chairmen and other union officials. Aeronautical Lodge v. Campbell, 337 U.S. 521 , 526-27 (1949).

Indeed, seniority systems include so wide a variety of definitions, restrictions, conditions, and qualifications, and vary so greatly as to when seniority begins, how it is lost, what it covers, what it is subject to, how it is accumulated, and more,[5] that modifying a particular system to prevent reversal of some modest gains for a federal policy of the "highest priority," seems well within a court's equity discretion. Indeed, a statute or a voluntary union-employer agreement could so modify it. United Steelworkers v.

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[5] See Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962); American Tobacco Co. v. Patterson, 102 S.Ct. 1534, 1536 (1982) (promotions based on seniority plus certain qualifications); California Brewers Ass'n v. Bryant, 444 U.S. 598, 606-08 (1980).

Weber, supra, Tangren v. Wackenhut, 480 F.Supp. 539 (D.Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, 102 S.Ct. 1771 (1982); Savannah Printing Specialities v. Union Camp Corp., supra.

Of course, seniority should not be lightly overridden. As the cases cited by Petitioners indicate,[6] seniority has a very high value. For that very reason, the courts below had an obligation, as a matter of law, which was not fulfilled--i.e., to explore and direct the implementation of other alternatives. Indeed, we believe the

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[6] The cases are distinguishable, however. For example, in Ford Motor Co. v. EEOC, 102 S.Ct. 3057 (1982), the danger was that seniority would be adversely affected before discrimination was proven; here, the trial court took judicial notice that there had been discrimination.

courts below had the power and obligation to find and spend funds it claimed it did not have, if necessary.

B. The Courts Below Should Have Given Further Consideration To Alternatives.

Before Memphis was required or permitted to layoff firefighters on a racial basis, the district court should have required a showing that there were no alternatives, such as those suggested below, to the use of racially-based dual seniority lists.

Perhaps none of these alternatives standing alone would have been sufficient to prevent all layoffs. Taken together, they might have substantially reduced the need for layoffs, perhaps to the point where the racial impact was not so devastating that it need have been "cured" at all. Perhaps none of these alternatives would have worked. But if that is so, then the race-based layoffs would at

least have been--and been perceived as--the least restrictive alternative, a prerequisite under University of California Regents v. Bakke, 438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), for the use of racial criteria.

That alternatives be considered is a requirement not only of federal constitutional law, but stems from the mandate of Title VII itself. The decision to reduce costs by means of layoffs, as opposed to the use of other cost-cutting alternatives,[7] is itself a

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[7] In NAACP v. D.P.O.A., 525 F.Supp. 1215 (E.D. Mich. 1981), black police officers sued the police union for not considering givebacks as an alternative to last hired, first fired layoffs, which would impact most heavily on newly hired blacks. The theory was breach of the duty of fair representation owed minority employees. The union defended citing the seniority provisions of Title VII. The Court refused the

decision about "the terms and condition of employment" subject to the rule of Griggs v. Duke Power Co., 401 U.S. 424 (1971), that an employment decision which has a disparate impact on minorities is illegal,[8] unless justified by business necessity. See Blumrosen & Blumrosen, The Duty to Plan For Fair Employment Revisited: Work Sharing In Hard Times, 28 Rugers L. Rev. 1082 (1975); (hereafter Duty to Plan); Summers and Love, Work Sharing As An Alternative to Layoffs By Seniority: Title VII Remedies in

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union's motion to dismiss, and set the matter for trial.

8 The New York City Commission on Human Rights in 1975 issued an "interpretive memo" stating that employers were under a legal duty to explore alternatives to "last hired, first fired" layoffs which had a disparate impact on minorities.

Recession, 124 U. Penn. L. Rev. 893 (1976); (hereafter Recession Remedies).[9]

Numerous alternatives have been suggested by the commentators as an alternative to last hired, first fired layoffs as a means of reducing labor costs. Of course, as we argue

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9 Additional authorities who support exploration of alternatives in place of last hired, first fired layoffs include: Stacy, Title VII Seniority Remedies In A Time of Economic Downturn, 28 Vanderbilt L. Rev. 4876 (1975); Silbergold, Title VII & the Collective Bargaining Agreement: Seniority Under Fire, 49 Temple L. Q. 288 (1976); Fix, Plant Seniority & Minority Employees: Title VII's Effect on Layoffs, 47 Col. L. Rev. 73 (1976); Elkiss, Modifying Seniority Systems Which Perpetuate Past Discrimination, 31 Labor L. Jnl. 37 (1980); Wood, Equal Employment Opportunity and Seniority: Rights In Conflict, 26 Labor L. Jnl. 3345 (1975); Thorp, Racial Discrimination and Seniority, 23 Labor L. Jnl. 398 (1972); Waerdt, Affirmative Action and Tenure, 11 Jnl. L. and Educ. 507 (1982).

elsewhere in this brief, Point C, infra, it is not clear that Memphis should be permitted to use its lack of funds as a basis for shifting the burden of remedying its illegal actions. But even if it were, use of these alternatives in this case would have eliminated the adverse impact on newly hired minority officers, and would have also eliminated the need for race based layoffs to the disadvantage of white employees. While these alternatives would not have been cost free, they would have avoided or minimized the need for consideration of race, a uniquely onerous burden under the Constitution.

Two distinct types of alternatives suggest themselves. First, the district court should have explored the

possibility that a reallocation of funds from other municipal activities--or other aspects of the Fire Department budget--would have eliminated or reduced the need for layoffs of fire department employees. Perhaps, too, the "crisis" would have resolved itself simply through normal attrition.

Second, even if it was determined that layoffs of firefighters were necessary, the court should have considered alternatives which spread the effect of the layoffs more broadly, and which, consistent with the basic thrust of §703(h), did not subordinate the rights of older white workers to minority workers. The alternatives of this type which at least should have been examined by the district court and the parties include:

(a) Worksharing--that is, the imposition of reduced hours for all employees, so that all might retain most of their income. This practice is widespread in several industries, notably the needletrades and furniture, as a means of allocating scarce work and fairly distributing hardships. Other instances of it have been reported. See, e.g., ¶443.59 F.E.P.; (Diamond International Corp.); N.Y. Times May 18, 1975 §4, at 8, col. 2 (N.Y. Telephone).

There have, indeed, been numerous arbitration decisions addressing the question of whether worksharing is inconsistent with collective bargaining agreements calling for last hired, first fired layoffs. The results are mixed,

Recession Remedies, supra, 124 U. Penn. L. Rev. at 903 n.32, but the trend is towards finding no inconsistency.

While it has been found that worksharing is feasible only when the work week remains at 30-32 hours, Wines, Seniority, Recession and Affirmative Action: The Challenge for Collective Bargaining, 20 Amer. Bus. L. J. 371 (1982), that is not an obstacle in this case, where a relatively small percentage of the firefighters were laid off.[10] Worksharing in the context of municipal services is not unprecedented. The U.S. Civil Service Commission report, Last Hired, First Fired: Layoffs and Civil Rights (1977), notes

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10 Wines also cites studies showing that 20 percent of collective bargaining agreements in effect in 1973 called for work sharing. This percentage reached 67 percent in the furniture industry.

that the Detroit Police Department resorted to payless days to avoid the need for layoffs of minority workers.

(b) Rotating Layoffs--Some have suggested that all employees be laid off for short periods of time, instead of indefinite layoffs of a few. There are several advantages of this scheme over long term layoffs--most notably that each employee retains health insurance and pension benefits. Moreover, because the layoff is total (as is not the case with worksharing) employees are eligible for unemployment insurance, thus reducing the financial pinch imposed.

(c) Givebacks--The parties could have considered cutbacks in salaries and fringe benefits (particularly vacations and personal days) with the savings used

to retain other employees. Such renegotiations of union contracts are today hardly uncommon.

(d) Early Retirement--The City might have been ordered to explore the possibility of making early retirement more attractive to older workers. One of the particular drawbacks of the scheme ordered by the district court is that the workers most likely to have benefitted from the prior discrimination are not those laid off, while those who competed against blacks fairly are laid off. Making early retirement attractive (as by allowing fictional service credits) would allow for the preservation of jobs for those people who did compete fairly, and would place

the costs of discrimination where they ought to be--on Memphis and its taxpayers.

Another advantage of early retirement is that it ameliorates one of the worst features of seniority-based layoffs--the discharging of young vigorous workers instead of older, more settled ones. This alternative would make permanent the minority percentage gains in the Fire Department, and would end the need for "quotas" at an earlier date.

(e) Restriction on Overtime--If Memphis has some of its firefighters working scheduled overtime at premium pay, its elimination might save sufficient funds to avoid at least some layoffs. Of course, the nature of firefighting work is such that not all overtime could be eliminated.

(f) Voluntary Layoffs (Leave)--Some employees might want to take additional time off, whether for a few days or for several months.

(g) Damages--There is one other possibility which has not received adequate attention--that of ordering Memphis to pay damages to white officers laid off to maintain a complement of black officers. McAleer v. A.T.T., 416 F.Supp. 435 (D.D.C. 1976), relying on Chief Justice Burger's concurring opinion in Franks, held that such relief was appropriate. McAleer is attractive because it places the onus of correcting past discrimination on the guilty parties--in this case, Memphis and it taxpayers.[11]

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[11] Discussing the proposed intervenors' suggestion that the trial court should have originally awarded compensatory relief to

C. An Asserted Lack of Funds Should Not Have Been Permitted To Override Either The 1980 Decree or Seniority Rights.

The dilemma which this case presents arises from a conflict among three different policies and principles: the federal anti-discrimination policy, the seniority principle, and the cost-cutting policy adopted by the City of Memphis in response to its fiscal problems. The courts below resolved

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non-minority employees, the Court of Appeals stated that the increased costs would destroy a primary incentive to settlement and thus would be inimical to the policy encouraging settlements embodied in Title VII. Whatever the merits of the Court of Appeals' view in the context of the original settlement, the argument does not undercut the amicus' argument here. While encouraging settlement is surely a valid Title VII goal, there are equally or more important values embodied in Title VII and the Constitution, among them, fairness and the use of non-racial criteria for employment decisions by employers.

this case by looking only at the clash between the first two policies; the third was viewed, implicitly, as beyond examination, perhaps because those courts believed they were powerless to order relief which would involve spending monies which the City claimed it did not have. In that, they erred.

It is a maxim that constitutional rights may not be denied for lack of funds. See, e.g., Bounds v. Smith, 430 U.S. 817, 824-25 (1977). A federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651

(1974).[12] See also Milliken v. Bradley, 443 U.S. 267 (1977) (affirming order of district court compelling state to pay for purchase of school buses as part of court ordered desegregation plan).

State law may not frustrate the operation of federal law even though the state legislature in passing its law had some purpose in mind other than frustration. Perez v. Campbell, 402 U.S. 637 (1971). State policy must give way when it operates to hinder vindication of federal constitution guarantees. North Carolina State Board of Education v. Swann, 402 U.S. 43, 45 (1971). A fortiorari, a municipality's

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[12] The Eleventh Amendment stands as no bar. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

decision as to how to balance its budget must yield when necessary to protect federal constitutional rights.

Federal courts have under certain circumstances suspended the effectiveness of state or local policies or laws which have interfered with the implementation of court decrees. Thus, in Gautreaux v. Chicago Housing Authority, 342 F.Supp. 827 (N.D.Ill. 1972), aff'd, 480 F.2d 210 (7th Cir. 1973), cert. denied, 414 U.S. 1144 (1974), the City Housing Authority, under court order to increase the supply of housing as part of a desegregation plan, submitted proposed sites to the Chicago City Council as required by statute. When the Council refused to approve or even consider housing sites which the Authority had submitted, the

court, finding that this had the effect of thwarting "correction of federal constitutional wrongs," suspended the statutory requirement of Council approval and replaced it with another approval mechanism.

Similarly, in the course of Mississippi prison litigation, after the court prohibited acceptance of more prisoners in an overcrowded penitentiary, the state passed a statute requiring acceptance of all prisoners, and the court thereupon issued a TRO against its enforcement. Gates v. Collier, 407 F.Supp. 117 (N.D.Miss. 1976), aff'd, 548 F.2d 1241 (5th Cir. 1977).

The City's decision to reduce its payroll expenditures could also have been overridden if necessary to

accomplish the aims of the decree. The federal courts have power to issue financing orders to secure individuals' constitutional rights to equal protection. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964), this Court said:

> [T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

Cf. Virginia v. West Virginia, 246 U.S. 565 (1918) (discussing mandamus of state legislature to levy a tax to satisfy a judgment recovered by sister state). See generally Comment, Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a

Remedy, 59 Geo.L.J. 393 (1970). But see United States v. County of Clark, 95 U.S. 769 (1874) (where county is taxing at maximum rate, mandamus cannot issue); Louisiana v. Jumel, 107 U.S. 711 (1883) (mandamus will not be issued for the release of money in the state treasury, without authorization and appropriation); Clay County v. McAleer, 115 U.S. 616, 618 (1885) (court cannot order taxing board to levy a tax in excess of maximum allowed where such tax is not enough to pay the judgment); United States v. County of Macon, 99 U.S. 582 (1879) (mandamus will not lie to compel the levy of a tax beyond the authorized amount).

While it is true that recent cases demonstrate that the courts are hesitant to order states or their political

subdivisions to raise and allocate sums of money and will explore all alternatives to such orders, including the shutting down of the offending institutions, see, e.g., Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1975); Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980), it must be true, for the Supremacy Clause demands no less, that if such alternatives do not exist or would not be effective to remedy the Constitutional violation, the court is empowered to compel the state or local governments to raise and spend such

funds as are necessary to remedy the violation. See Griffin v. County School Board of Prince Edward County, supra.[13]

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13 The City's financial problems apparently have been resolved and the City now appears to be in excellent financial health. In 1983, the voters approved a sales tax increase; the property tax rate has been reduced. This demonstrates that when more flexible alternatives are considered, methods can be devised for avoiding the painful conflict created by the clash between the principles underlying affirmative action and seniority.

CONCLUSION

For the above stated reasons, if the case is not moot, the judgment below should be affirmed, but the order of the District Court should be modified to require consideration of alternate solutions in the event a conflict between the anti-discrimination remedy and seniority rights should arise in the future.

Respectfully submitted,

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